

(ii) Whether the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(3) The requester has the burden of establishing eligibility for a waiver of fees or for reduced fees. The denial of a request for waiver of fees may be appealed under subpart C of this part.

§ 1204.13 Denials.

A denial of a request for reduced fees or of a request for waiver of fees, or denial of a request for a record, in whole or in part, will be made in writing, will state the reasons for the denial, and will notify the requester of the right to appeal the denial.

§ 1204.14 Requests for access to confidential commercial information.

(a) *General.* Confidential commercial information provided to the Board by a business submitter will not be disclosed in response to a Freedom of Information Act request except in accordance with this section.

(b) *Definitions.* (1) The term *confidential commercial information* means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) The term *submitter* means any person or entity who provides confidential commercial information to the government. The term “submitter” includes, but is not limited to corporations, state governments, and foreign governments.

(c) *Notice to business submitters.* The Board will provide a business submitter with prompt written notice of a request encompassing its confidential commercial information whenever that action is required under paragraph (d) of this section, and except as provided in paragraph (h) of this section. This written notice will either describe the exact nature of the confidential information requested or will provide copies of the records or portions of records containing the commercial information.

(d) *When initial notice is required.* (1) With respect to confidential commercial information submitted to the Board before January 1, 1988, the Board will give the business submitter notice of a request whenever:

(i) The information is less than 10 years old; or

(ii) The Board has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(2) With respect to confidential commercial information submitted to the Board on or after January 1, 1988, the Board will give notice to the business submitter whenever:

(i) The business submitter has designated the information in good faith as commercially or financially sensitive information; or

(ii) The Board has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(3) Notice of a request for commercially confidential information submitted before January 1, 1988, is required for a period of not more than 10 years after the date on which the information is submitted unless the business submitter requests, and provides justification for, a longer specific notice period. Whenever possible, the submitter’s claim of confidentiality must be supported by a statement or certification, by an officer or authorized representative of the company, that the information in question is in fact confidential commercial information and has not been disclosed to the public.

(e) *Opportunity to object to disclosure.* Through the notice described in paragraph (c) of this section, the Board will afford a business submitter a reasonable period within which to provide a detailed statement of any objection to disclosure. The statement must specify all grounds for withholding any of the information under any exemption of the Freedom of Information Act. In addition, in the case of Exemption 4, the statement must demonstrate why the information is alleged to be a trade secret, or to be commercial or financial information that is privileged or confidential. Information a business submitter provides under this paragraph

may itself be subject to disclosure under the Freedom of Information Act.

(f) *Notice of intent to disclose information.* The Board will consider carefully a business submitter's objections and specific grounds for claiming that the information should not be disclosed before determining whether to disclose confidential commercial information. Whenever the Board decides to disclose confidential commercial information over the objection of a business submitter, it will forward to the business submitter a written notice that includes:

(1) A statement of the reasons for which the business submitter's disclosure objections were not sufficient;

(2) A description of the confidential commercial information to be disclosed; and

(3) A specified disclosure date. The Board will forward the notice of intent to disclose the information a reasonable number of days, as circumstances permit, before the specified date upon which disclosure is expected. It will forward a copy of the disclosure notice to the requester at the same time.

(g) *Notice of Freedom of Information Act lawsuit.* Whenever a requester files a lawsuit seeking to compel disclosure of business information covered by paragraph (d) of this section, the Board will notify the business submitter promptly.

(h) *Exceptions to notice requirements.* The notice requirements of this section do not apply when:

(1) The Board determines that the information should not be disclosed;

(2) The information lawfully has been published or otherwise made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The disclosure is required by an agency rule that:

(i) Was adopted pursuant to notice and public comment;

(ii) Specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act; or

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submit-

ted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(5) The information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to this section, when the submitter has an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(6) The designation made by the submitter in accordance with Board regulations appears obviously frivolous; except that, in such case, the Board must provide the submitter with written notice of any final administrative disclosure determination within a reasonable period prior to the specified disclosure date.

Subpart C—Appeals

§ 1204.21 Submission.

A person may appeal a denial by the Clerk of the Board, or by any regional director, of access to agency records, waiver of fees, or reduction of fees. The appeal must be filed with the Chairman, Merit Systems Protection Board, 1120 Vermont Avenue NW., Washington, DC 20419. Any appeal must include a copy of the initial request, a copy of the letter denying the request, and a statement of the reasons why the appellant believes the denying official erred.

[55 FR 39911, Oct. 1, 1990, as amended at 59 FR 65243, Dec. 19, 1994]

§ 1204.22 Decisions on appeal.

Decisions on an appeal will be made within 20 workdays after the appeal is received. Each decision will be in writing and, if the denial of access to records is upheld, will contain the reasons for the decision, as well as information about the appellant's right to seek judicial review of the denial.